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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-856

THE PECOS COUNTY STATE BANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (App., *infra*, pp. 9–13) are not officially reported. The opinion of the court of appeals (Pet. App. A, 1a–29a) is reported at 466 F. 2d 1040.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, 30a) was entered on September 7, 1972. A timely petition for rehearing (Pet. App. C, 31a–32a) was denied on October 31, 1972. The petition for a writ of certiorari was filed on December 11, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

494-010—73—1

QUESTION PRESENTED

Whether the government's federal tax lien had priority over petitioner's security interest in accounts receivable which came into existence more than 45 days after the notice of tax lien was filed.

STATUTES INVOLVED

Sections 6321 and 6323(c) of the Internal Revenue Code of 1954, 26 U.S.C. 6321 and 6323(c), are set forth at Pet. App. D, 32a–35a. Section 6322 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. 6322, provides:

> Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

STATEMENT

This case involves the priority of competing claims to an interpleaded fund of $14,690.10 owed by Texas Oil & Gas Corporation to the taxpayer, Hilton R. Blackmon, d/b/a Blackie's Oil & Gas Field Services. The United States claims the fund by reason of federal tax liens against the taxpayer for $54,746.40 representing unpaid withholding and FICA taxes assessed for taxable periods in 1969. Notices of lien were filed on February 27, 1970. Petitioner's claim to the fund derives from a security agreement given it by the taxpayer on March 25, 1967, in which the taxpayer agreed to factor his accounts receivable in considera-

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tion for periodic loans from petitioner. A financing statement describing the collateral covered by the security agreement was duly filed by petitioner on March 29, 1967 (Pet. App. A, 2a–4a).

During September, October and November 1970, Texas Oil & Gas became indebted to the taxpayer in the total amount of $14,690.10 on account of professional services and equipment furnished by taxpayer (Pet. App. A, 2a, 5a). Earlier, on December 26, 1969 and January 1, 1970, a delegate of the Secretary of the Treasury had made assessments against the taxpayer for federal withholding and FICA tax liabilities for the second and third quarters of 1969. Notices of lien were filed on February 27, 1970. In an effort to collect the tax, the United States caused a notice of levy to be served upon Texas Oil & Gas in an effort to seize the amount by which that corporation was indebted to the taxpayer (Pet. App. A, 5a).

Petitioner first became aware of the existence of the tax lien after October 22, 1970. Shortly thereafter, petitioner served notice on Texas Oil & Gas to pay over to it, pursuant to the security agreement, the same indebtedness levied upon by the United States. Texas Oil & Gas thereupon interpleaded the fund due to the taxpayer into the registry of the district court, pending a determination of priorities with respect thereto (Pet. App. A, 5a).

On cross motions for summary judgment, the district court determined that the tax liens of the United States were prior to petitioner's claim. The court of appeals affirmed (Pet. App. A, 2a). Both courts held

that the petitioner's lien with respect to the accounts receivable was not choate at the time the federal tax lien was filed or within 45 days thereafter so as to qualify for priority under Section 6323(c) of the Internal Revenue Code of 1954.

ARGUMENT

Section 6321 of the Internal Revenue Code of 1954 imposes a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to a delinquent taxpayer. Section 6322 provides that the tax lien arises when the taxpayer's liability is assessed and continues in force until the assessment is satisfied or becomes unenforceable. Section 6323 provides that notice of lien must be filed before the lien is valid as against certain classes of creditors, including holders of security interests.

Once filed, the federal tax lien is fully perfected and complete and attaches to all of the taxpayer's property, both presently owned and subsequently acquired. *Glass City Bank* v. *United States,* 326 U.S. 265. Prior to 1966, in order to defeat the government's lien, a competing creditor had to show that his lien was "choate" at the time the federal lien was filed. *United States* v. *New Britain,* 347 U.S. 81; *United States* v. *Security Tr. & Sav. Bk.,* 340 U.S. 47; *Spokane County* v. *United States,* 279 U.S. 80. Choateness requires that the identity of the lienor, the property subject to the lien, and the amount of the lien, all be established. All three requirements of choate-

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ness had to be met before the competing lien was deemed perfected; a failure in any one respect subordinated the nonfederal claim to the tax lien. *United States* v. *New Britain, supra; United States* v. *Pioneer American Ins. Co.,* 374 U.S. 84.

In 1966, Congress completed a comprehensive revision of the provisions of the Internal Revenue Code concerned with the relationship of federal tax liens to the interests of other creditors. Federal Tax Lien Act of 1966, Pub. L. 89–719, 80 Stat. 1125. One of the changes effected by this Act was the addition of Section 6323(c), according a limited priority over duly filed federal tax liens to, *inter alia,* security interests arising under commercial transactions financing agreements entered into before the tax lien filing in certain cases where the funds were advanced, or the property referred to in the agreement came into existence, after the tax lien filing. This new priority was limited, however, to situations (1) where the loan or purchase was made without actual knowledge of the tax lien, and (2) the security interest attached to property in existence not later than 45 days after the tax lien filing. In other words, for certain types of accounts receivable and inventory financing the Act relaxed the requirement that the competing private lienor must have a choate lien which attached to existing specific property of the taxpayer, so long as the lien became choate within 45 days of the tax lien filing. Insofar as is here relevant, the choateness requirement for liens competing with the federal tax lien

remained otherwise unchanged. *Continental Finance Co., Inc.* v. *Cambridge Lee Metal,* 100 N.J. Super. 327, 241 A. 2d 853; *In re Rosenberg's Will,* 62 Misc. 2d 12, 308 N.Y.S. 2d 51. See Plumb and Wright, *Federal Tax Liens* 89 (2d ed.).

Although secured by a commercial transactions financing agreement, petitioner did not have a choate lien with respect to the Texas Oil & Gas receivables either at the time of the filing of notice of the government's lien or within 45 days thereafter. The Texas Oil & Gas receivables arose more than six months after the tax lien was recorded. Petitioner's claim to the receivables was inchoate both at the time the federal lien was filed and 45 days thereafter, because the property subject to the lien did not come into existence until more than 45 days after the date of filing. Moreover, petitioner apparently failed to check the records for the existence of a federal tax lien as contemplated by Congress. See S. Rep. No. 1708, 89th Cong., 2d Sess., p. 8. Instead, petitioner continued to make loans to taxpayer until October 1970, when it obtained actual notice of the existence of the federal lien. No showing was made that even the debt underlying its claim here arose prior to or within 45 days after the government's filing of its notices of lien. In these circumstances the courts below correctly concluded that petitioner's claim was inchoate at the determinative times under federal standards and that the federal lien was therefore superior.

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Petitioner suggests that the decision below, holding the government's lien perfected at the time of filing, is inconsistent with *United States* v. *New Britain, supra.* But in that case the Court simply held that, as to property held by a debtor at all relevant times, priority would be accorded to the liens first filed and perfected. Thus that decision does not support petitioner's contention that the government's lien here was unperfected until the receivables had come into existence. This case, unlike *New Britain,* involves after-acquired property. But petitioner's suggestion that a federal lien against such property attaches only at a time significantly later than the original assessment and filing is contrary to the clear language of Section 6322. Moreover, this Court held in *Glass City Bank* v. *United States, supra,* that a federal tax lien attaches to after-acquired property at the date of filing.

Petitioner's contention is also contrary to the express language of Section 6323. That Section by its terms covers after-acquired property as well as property in existence at the time of filing the government's notice of lien, and it explicitly limits the priority of private lienors to situations where the lien against the secured property is choate "before the 46th day after the date of tax lien filing." In short, it is the clear statutory purpose to subordinate private lienors as to property acquired more than 45 days after filing. See *Continental Finance Co., Inc.* v. *Cambridge Lee Metal, supra; In re Rosenberg's Will, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
CROMBIE J. D. GARRETT,
JANET R. SPRAGENS,
Attorneys.

JANUARY 1973.

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APPENDIX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Came on to be heard the above cause and the Court having heard and considered the evidence and argument of counsel and briefs filed, does make the following Findings of Fact, Conclusions of law and enters the following Judgment:

FINDINGS OF FACT

1. That the Plaintiff, Texas Oil and Gas Corporation, is a Delaware Corporation having its principal place of business at 2700 Fidelity Union Tower Building, Dallas, Texas.

2. That the Defendant-taxpayer, Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, is a resident of Fort Stockton, Pecos County, Texas.

3. That the Defendant, The Pecos County State Bank, is a Texas banking corporation having its principal place of business at 500 N. Main Street, Fort Stockton, Pecos County, Texas.

4. That prior to March 25, 1967, the defendant-taxpayer, Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, was engaged in the business of servicing and repairing oil wells and related equipment.

5. That on March 25, 1967, the defendant-taxpayer entered into a written "Security Agreement" with the defendant, the Pecos County State Bank, whereby the defendant-taxpayer agreed to factor his accounts receivable with the defendant bank as soon as they arose, in consideration for loans from the bank.

6. That contemporaneously with the execution of this Security Agreement, the Defendant bank executed a "Financing Statement" describing the collateral covered by the Security Agreement.

7. That this Financing Statement was filed with the Secretary of State of the State of Texas on March 28, 1967.

8. That the defendant bank continued to factor accounts receivable due to the defendant-taxpayer under the Security Agreement dated March 25, 1967, until on or about October 15, 1970.

9. That the defendant-taxpayer, Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, performed services on behalf of the Plaintiff, Texas Oil and Gas Corporation, which were completed some time in September of 1970.

10. That the Plaintiff is presently indebted to the defendant-taxpayer for the services performed by him in the total amount of $14,690.10.

11. That on December 26, 1969, a delegate of the Secretary of the Treasury made an assessment for the federal withholding and FICA tax liability for the second quarter of 1969 against the defendant-taxpayer, Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, in the total amount of $34,284.08.

12. That on January 1, 1970, a delegate of the Secretary of the Treasury made an assessment for the federal withholding and FICA tax liability for the third quarter of 1969 against the defendant-taxpayer in the total amount of $20,832.93.

13. That on February 27, 1970, a Notice of Federal Tax Lien, reflecting the federal tax liability of Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, was filed with the County Clerk, Pecos County, Fort Stockton, Texas.

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14. That in an effort to collect the outstanding federal tax liability of the defendant-taxpayer, the United States of America, by and through its Internal Revenue Service, caused a Notice of Levy to be served upon the plaintiff, Texas Oil and Gas Corporation, which sought to seize the fund of money held by the plaintiff and due and owing to the defendant-taxpayer.

15. That shortly thereafter, the defendant, the Pecos County State Bank, served notice upon the plaintiff to pay over to it, pursuant to its Security Agreement with the defendant-taxpayer, the sum of money due and owing to the defendant-taxpayer.

16. That in an attempt to avoid personal liability, the plaintiff has tendered to the Registry of this Court the sum of money that it owes the defendant-taxpayer—$14,690.10—for a determination of the priority to such sum by this Court.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction over the subject matter of this action pursuant to Section 1335 of Title 28, United States Code.

2. That this Court has jurisdiction over the United States pursuant to Section 1340 of Title 28, United States Code and Section 2410 of Title 28, United States Code, which provides the requisite waiver of the sovereign immunity of the United States of America.

3. That the tax assessments made against the defendant-taxpayer herein, Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, create a lien in favor of the United States in the amount of his unpaid federal tax liability, which attaches to all property and rights to property, whether real or personnel, belonging to the defendant-taxpayer, including the fund of money interpleaded into the Registry of this

Court. Section 6321 of the Internal Revenue Code of 1954 (26 U.S.C. § 6321).

4. That the security interest existing in favor of the defendant, the Pecos County State Bank, and the basis of its claim for priority to the interpleaded fund, was executed and filed in accordance with the provisions of the Texas Uniform Commercial Code. Sections 9.302(a)(1) and 9.305, Vernon's Texas Code Annotated, Bus. & C.

5. That in determining the validity of the federal tax lien created by Section 6321 of the Internal Revenue Code of 1954, and in determining its priority as against state-created liens, federal law is controlling upon this Court. *United States* v. *Bess,* 357 U.S. 51 (1958).

6. That the issue before this Court as to the priority of the federal tax lien relied upon by the Government, vis-a-vis the state-created claim asserted by the Defendant bank, must be resolved by reference to Section 6323 of the Internal Revenue Code of 1954 which provides that a properly filed Notice of Federal Tax Lien is entitled to priority over a state-created security interest, such as the commercial transaction financing agreement relied upon by the defendant bank, unless the security interest meets the following requirements: (1) the identity of the lienor is established; (2) the amount of the loan is in existence within 45 days subsequent to the filing of the Notice of Federal Tax Lien, and (3) the property to which the security interest attaches is in existence within 45 days subsequent to the filing of the Notice of Federal Tax Lien. Section 6323(c)(2)(A)(ii) of the Internal Revenue Code of 1954 (26 U.S. § 6323(c)(2)(A)(ii)); *United States* v. *Ball Construction Company,* 355 U.S. 587 (1958); *First State Bank of Med-*

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ford v. *United States,* 166 F. Supp. 204 (D. Minn., 1958).

7. That the lien relied upon by the defendant, the Pecos County State Bank was not in an established amount nor was there identifiable property to which it attached until completion of the services performed by the defendant-taxpayer in September of 1970, a time subsequent to April 14, 1970, the expiration of the 45 day grace period after the filing of the Notice of Federal Tax Lien provided by Section 6323(c)(A)(ii) of the Code.

8. That based on the applicable provisions of federal law, the United States of America is entitled to priority to the interpleaded fund over the defendant, the Pecos County State Bank.

9. That the Plaintiff, as a disinterested stake-holder, is not entitled to attorney's fees in this action as the total amount in the fund is insufficient to satisfy prior federal tax liens. *United States* v. *State National Bank of Connecticut,* 421 F. 2d 519 (C.A. 2, 1970); *United States* v. *Ray Thomas Gravel Co.,* 380 S.W. 2d 576 (Tex., 1964).

10. That the United States is accordingly entitled to the entire amount of the fund interpleaded into the Registry of this Court.

JUDGMENT

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the District Clerk, be, and hereby is directed to pay to the United States of America the entire amount of the fund interpleaded into the Registry of this Court in this case, and that the Defendants, The Pecos County State Bank and Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, take nothing.

Entered this 9th day of November, 1970.

ERNEST GUINN,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1978